S & L Vitamins, Inc. v. Australian Gold, Inc. Doc. 55

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ATTORNEYS FOR AUSTRALIAN GOLD, INC.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

S & L VITAMINS, INC., Plaintiff/Counterclaim Defendant, v. AUSTRALIAN GOLD, INC., Defendant/Counterclaim Plaintiff.	:	05 CV 1217 (JS)(ML)
AUSTRALIAN GOLD, INC., Third Party Plaintiff, v. LARRY SAGARIN AND JOHN DOES, 1-10, Third Party Defendants,	:	

DECLARATION OF FRANCIS J. EARLEY

FRANCIS J. EARLEY, pursuant to 28 U.S.C. § 1746, declares:

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1. I am associated with the law firm of Mintz Levin Cohn Ferris Glovsky & Popeo, P.C. located in New York, New York and represent Defendant Australian Gold, Inc. ("Australian Gold") in the above-captioned action.

2. Australian Gold's co-counsel is Scott D. Matthews, a member of the Indiana Bar and associated with the law firm Ice Miller in Indianapolis, Indiana.

3. I make this Declaration based on personal knowledge in support of Australian Gold's motion under Federal Rules of Civil Procedure 26, 37 and 45 to compel non-party to (a) produce documents requested in the subpoena dated October 7, 2005 and (b) to pay Australian Gold its reasonable costs and attorneys' fees incurred in making this motion.

4. On October 7, 2005, Australian Gold served subpoenas on the four suppliers that it has disclosed as its source for the Australian Gold, Swedish Beauty and Caribbean Gold tanning lotions. Service of process was affected by hand delivery on all four suppliers. A true and correct copy of the subpoena served on and the return of service is attached to Declaration of Scott Matthews as *Exhibit 1.*

5. response was due on or before October 21, 2005 but they failed to respond.

REDACTED

6. In an effort to avoid motion practice before the Court, Australian Gold has attempted to resolve this issue through means other than filing a motion to compel. On or about October 24, 2005, I placed a telephone call to at the telephone number provided by S&L Vitamins. I spoke with a person who identified himself as "Joe" and as one of the owners

of "Joe" represented to me that he had never heard of S & L Vitamins, the Supplenet or Larry Sagarin. "Joe" claimed that he purchased from a Florida distributor.

7. "Joe" also stated that he did not have any invoices related to his purchases of the Australian Gold products. Initially, "Joe" agreed to respond in writing to the subpoena and provide any documents related to his purchase and sale of the products. He also agreed to check his credit card receipts to determine if there were any sales made by credit card that would identify S & L Vitamins and/or Sagarin. "Joe" promised that would respond in writing to the subpoena by October 21, 2005. and "Joe" never responded.

8. Over the course of the next month, I attempted to contact "Joe" at to follow-up on its response to the subpoena; however, on every occasion, I was unable to reach Joe, or anyone else with knowledge of the subpoena. Finally, on or about November 30, 2005, I attempted to contact "Joe" at The person who answered the phone was not "Joe" but was familiar with the subpoena. He inquired as to why Australian Gold was "busting our b***s" over the subpoena. I explained that Australian Gold was simply seeking a written response to the subpoena and the production of any documents responsive to it. The person on the other end of the phone at abruptly ended the conversation by telling me to "go f*** myself."

REDACTED

9. To date, has still not responded to the subpoena.

10. For the reasons set forth above and fully explained in the accompanying Declaration of Scott D. Matthews and Memorandum of Law, I respectfully request that the Court grant Australian Gold's motion to compel non-party to produce documents

requested in the subpoena and pay Australian Gold its reasonable attorney fees and costs associated with filing this motion.

11. I declare under penalty of perjury that the foregoing is true and correct. Executed on December 8, 2005.

Respectfully submitted,

MINTZ LEVIN COHN FERRIS
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